82-1942

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

JOHN R. HOFFMAN, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
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ATTORNEYS FOR RESPONDENT.

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QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly uphold the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied

Petitioner the effective assistance of counsel?

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, did the Petitioner knowingly, voluntarily, and intelligently waive his right to conflict-free counsel?

INDEX

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 83-MO-57, filed March 30, 1983, as reproduced in Petitioner's Appendix A at pages 1a-2a.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly uphold the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied Petitioner the effective assistance of counsel?

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, did the Petitioner knowingly, voluntarily, and intelligently waive his right to conflict-free counsel?

ARGUMENT

I.

The South Carolina Supreme Court properly upheld the trial court's denial of the Petitioner's motion for a new trial on the basis that the Petitioner's trial counsel was laboring under an actual conflict of interest arising from the multiple representation of clients which denied the Petitioner the effective assistance of counsel.

On appeal to the South Carolina Supreme Court, the Petitioner asserted that his trial counsel was laboring under an actual conflict of interest

arising from his representation of one of Petitioner's coconspirators who testified for the State at Petitioner's trial which thus denied the Petitioner the effective assistance of counsel. The Respondent would submit, in light of the testimony of the Petitioner and his coconspirator at trial, and considering the fact that the Petitioner was represented at trial by two attorneys, one of whom Petitioner does not allege to have had a conflict, that the Petitioner has not demonstrated that an actual conflict existed which adversely affected his legal representation at trial.

The record reflects that the Petitioner's brother-in-law and coconspirator, George Moose, was arrested on June 27, 1979. (Tr. p. 13). On July 2, 1979, the Petitioner paid J.

M. Long, Esquire, Fifteen Thousand Dollars ($15,000) to represent Mr. Moose. (Tr. p. 1644). On July 26, 1979, the Petitioner paid Mr. Long the first installment toward another Fifteen Thousand Dollar ($15,000) fee to represent the Petitioner. (Tr. p. 1645). On August 17, 1979, another coconspirator, Bill Bryant, made a statement to police. (Tr. p. 16). On August 17, 1979, an arrest warrant was issued for the Petitioner. (Tr. pp. 1-2). On that same date, the Petitioner was telephoned out of state by his attorney, Mr. Long and advised that an arrest warrant had been issued for him. On the following day, August 18, the Petitioner turned himself in to the police. (Tr. p. 1297). On August 18, Mr. Long negotiated an oral plea agreement for Mr. Moose. (Tr. p. 16).

On August 21, 1979, Mr. Moose made his statement to the police. (Tr. p. 628, lines 15-18). Mr. Moose testified at Petitioner's trial and at his plea hearing that he had not advised Mr. Long about his involvement in the crime until a couple of days before his statement. (Tr. p. 629, lines 3-12; p. 285, lines 17-21). He further testified that he had originally remained silent in an effort to help the Petitioner and that only after the Petitioner advised him through Mr. Long to talk and tell the truth had he made his statement. (Tr. p. 671, lines 2-12; p. 672, lines 1-7). Between the time of Mr. Moose's initial arrest and Petitioner's trial, Mr. Moose was out on bond. During most of this period he stayed with the Petitioner. (Tr. p. 653, lines 1-24).

The Respondent would submit that under the facts of this cse, the South Carolina Supreme Court properly found that the Petitioner has not shown a conflict which adversely affected his legal representation at trial. In order to demonstrate a violation of a Sixth Amendment right, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Vance v. State, 275 S.C. 162, 268 S.E.2d 275 (1980). In this case, assuming that the testimony of the Petitioner and Mr. Moose constituted the information they provided to their attorney, Mr. Long, it is clear that Mr. Moose was guilty as a conspirator in the murder and that the only defense available to the Petitioner was the

defense of withdrawal. Based on these facts, it was in the best interests of Mr. Moose, whether represented by Mr. Long or another independent counsel, to plea bargain in exchange for his testimony. Whether or not represented by Mr. Long, the Petitioner would have been confronted with Mr. Moose's testimony at trial. Since the Petitioner would have been confronted with the testimony of Moose at trial no matter who his attorney was, there was no actual conflict which adversely affected the representation of Petitioner at this point. In fact, considering the nature of Petitioner's defense, it is more than arguable that the access of Petitioner to Moose due to his intended testimony and his statements aided the Petitioner in preparation of his defense. Thus since

there was no conflict which affected the adequacy of Petitioner's representation prior to trial, the question becomes was the Petitioner's legal representation affected at trial? It is clear that it was not, because of the fact that at trial Petitioner was represented by other independent counsel who suffered under no conflict of interest and who conducted a thorough cross-examination of Moose and commented on Moose and his testimony in closing argument. United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), cert. denied, 446 U.S. 964, 100 S.Ct. 2939. Thus there was no conflict of interest which adversely affected the representation of the Petitioner under the facts and the defenses raised at trial.

The Respondent would submit that the Petitioner reads much into the South

Carolina Supreme Court's summary affirmation of the trial court's judgment. The opinion merely stated that "...no error of law is present, and that a full written opinion would be without precedential value." The precise grounds for the holding are not known. This issue may well have been decided based on the Petitioner's waiver of any denial of rights. (See Question III). This question is without merit.

II.

The South Carolina Supreme Court properly upheld the trial court's denial of Petitioner's motion for a new trial on the basis that the Solicitor's comments in closing argument concerning Petitioner's attorney's joint representation of Petitioner and two codefendants were prejudicial and denied

Petitioner the effective assistance of counsel.

The Petitioner alleges that certain questions asked coconspirators, Danielson and Moose, and certain statements made by the Solicitor during closing argument constituted improper prejudicial comment by the Solicitor on the joint representation of the Petitioner and his two coconspirators by the Petitioner's trial counsel, Mr. Long. The Respondent would submit as to the questions asked the coconspirators, that the questions constituted a proper line of inquiry, that no objection was made at trial to the questions, that the questions were not made the subject of proper exception on appeal and that the issue as it relates to these questions was properly decided by the South Carolina Supreme Court. As for the

comments during closing argument, the Respondent would submit that no objection was made at trial nor was the issue made a basis for the motion for a new trial before the lower court and thus the issue was properly resolved against the Petitioner on appeal.

As for the questions asked Danielson and Moose, the South Carolina Supreme Court has long held that questions asked and answered without objection at trial cannot be challenged for the first time on appeal. State v. Jones, 268 S.C. 227, 233 S.E.2d 287 (1977); 7A South Carolina Digest, Criminal Law §1036. A defendant may not reserve a vice until he learns what the result will be and following an unfavorable verdict seek to take advantage of the alleged error on appeal. State v. Penland, 275 S.C. 537,

273 S.E.2d 537 (1981); State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716 (1959). This rule applies in cases where although the death penalty is sought, a sentence less than death was given. State v. Fields, 264 S.C. 260, 214 S.E.2d 320 (1975); State v. Anderson, 253 S.C. 168, 169 S.E.2d 706 (1969). Further, issues on appeal are brought before the Court by proper exception. Rule 4, Section 6, Rules of Practice of the South Carolina Supreme Court. Where there is no exception which presents the issue for decision there is nothing to be decided and consideration of the issue should be dismissed. Evans v. Bruce, 245 S.C. 42, 138 S.E.2d 643 (1964). In this case the record is clear that no objection was made to the questions asked of Danielson and Moose which the Petitioner now

challenges as set out in his brief. Also, a review of the Petitioner's exceptions clearly indicates that no exception seeks to challenge the evidence in issue. (Tr. pp. 1657-1658). Thus, the issue was properly decided by the South Carolina Supreme Court.

However, assuming that the issue was preserved and made the subject of a proper exception on appeal, the record reflects that the questions were proper. A review of the evidence in context clearly indicates that the purpose of the questions was to elicit from Danielson and Moose that their testimony and statements were voluntarily and freely given without coercion and with the advice of their counsel.

As for the comments during closing argument, the record is clear that there was no objection to the argument made by

the Petitioner during or after the argument. Where a defendant fails to object to improper argument he waives consideration of the issue on appeal. State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); 7A West's South Carolina Digest, Criminal Law §1037. Further, it is clear from the record that while the Petitioner raised the issue as his exception number three (3) on appeal as having been presented to the trial court as a ground for a new trial (Tr. p. 1657), the issue was not set forth in the order of the trial court as being a separate ground for a new trial. (Tr. p. 1652). However, even assuming the issue was raised as a basis for a new trial motion, the South Carolina Supreme Court has clearly held that an objection to improper argument raised for the first time on a motion for a new trial

is too late. State v. McIver, 238 S.C. 401, 120 S.E.2d 393 (1961).

The argument is without merit.

III.

If there existed any conflict of interest for Petitioner's attorney, Mr. Long, the Petitioner knowingly, voluntarily, and intelligently waived his right to conflict-free counsel.

On October 15, 1979, the trial court held a special hearing in chambers in Horry County, concerning Mr. Long's representation of multiple clients and the understanding and position of the Petitioner, Mr. Moose and Miss Danielson concerning that representation. During that hearing the trial judge met with each defendant individually, then with the three defendants together and then with the three defendants and their

attorney, Mr. Long. (Tr. p. 21, line 1-p. 34, line 16; p. 34, line 17-p. 36, line 3; p. 36, line 4-p. 39, line 14). During that hearing (although the entire hearing was relevant to the potential conflict issue and any waiver) the following colloquy occurred between the Petitioner and the trial court:

> COURT: All right, now it is correct, is it not, that you are represented in this upcoming trial by Mr. J.M. "Bud" Long?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: Are you completely satisfied with his representation of you?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: Now, are you aware of the particular charges that are placed against you, the charge of accessory before the fact of murder, and criminal conspiracy? Are you aware that those are the charges against you?
>
> MR. HOFFMAN: Yes sir.
>
> COURT: All right now, are you aware of the fact that Mr. Long represents, as well as you, two other defendants in this case?

MR. HOFFMAN: Yes sir, I am.

COURT: Now, in the event that you should go to trial on the charges against you, are you aware of the possibility that while you would not be compelled to testify, that you may be called to testify, and you may voluntarily testify in this case?

MR. HOFFMAN: Yes sir.

COURT: And that if you did testify, that your testimony could affect other defendants represented by Mr. Long?

MR. HOFFMAN: Yes sir.

COURT: Are you aware of the possibility that the other two defendants represented by Mr. Long may be called to testify, and may testify?

MR. HOFFMAN: Yes sir.

COURT: And that the testimony of each one of these, should they testify, might affect you?

MR. HOFFMAN: Yes sir, I'm aware of it.

COURT: Are you aware that different verdicts may be returned against you, and other defendants, even though--represented by Mr. Long, even though the charge is the same?

MR. HOFFMAN: Yes sir.

COURT: In view of these matters which I have asked you

about, do you feel that Mr. Long can fully represent you?

MR. HOFFMAN: Yes sir, I do.

COURT: Now, Mr. Hoffman, are you aware of your absolute constitutional right to competent, independent legal counsel?

MR. HOFFMAN: Yes sir, I am.

COURT: Do you feel that you have such counsel in Mr. Long?

MR. HOFFMAN: Yes sir, I do.

COURT: Has he fully disclosed to you the fact that he represents the other two defendants?

MR. HOFFMAN: Yes sir, he has.

COURT: All right sir, now, I--of course, this Court does not know if you will proceed to trial, or if you should enter a plea of guilty. Do you understand that?

MR. HOFFMAN: Yes sir.

COURT: The Court would have no way of knowing and it would not be a part of the Court's--to know this, but in the event you should enter a plea of guilty, do you understand that even though you may plead guilty to the same charge as other defendants represented by Mr. Long, that different sentences could be imposed?

MR. HOFFMAN: Yes sir.
COURT: All right, now understanding all these matters that we have discussed, are you completely satisfied for Mr. J. M. Long to continue his representation of you?
MR. HOFFMAN: Yes sir, I am.
COURT: Do you have any objection to his representation of the other two defendants?
MR. HOFFMAN: None whatsoever, sir.
COURT: Thank you, sir.
MR. HOFFMAN: Thank you, sir. (Tr. p. 26, lines 18-p. 29, line 10). (Emphasis added).

Again on November 26, 1979, before the start of Petitioner's trial after its transfer to Georgetown County, the trial court again held an in camera hearing concerning Mr. Long's multiple representation of clients during which the Petitioner again advised the trial court that he did not consider there to be any conflict which required separate counsel and that he desired to have Mr.

Long continue to represent him. (Tr. p. 44, lines 18-22; p. 45, lines 13-16; p. 45, lines 21-25).

The record further reflects that prior to Petitioner's trial in Georgetown County, William Doar, Esquire, was hired to represent the Petitioner in addition to Mr. Long. (r. p. 1646). During voir dire the prospective jurors were advised repeatedly without objection that the Petitioner was represented by Mr. Long and Mr. Doar as trial counsel. (Tr. p. 51, lines 15-17; p. 60, lines 22-23; p. 94, lines 19-21; p. 110, lines 11-12; p. 124, lines 6-8; p. 141, lines 17-19; p. 152, lines 4-7; p. 169, lines 8-9; p. 179, lines 13-16; p. 200, lines 21-24; p. 228, lines 2-5; p. 247, lines 16-18). During the Petitioner's trial Mr. Doar gave an opening statement and a closing

argument, made motions and most importantly, conducted the cross-examination of Mr. Moose. (Tr. p. 311, line 9-p. 314, line 20; p. 674, line 25-p. 689, line 11; p. 1444, lines 4-11; p. 1486, line 2-p. 1505, line 8).

At trial the testimony of the Petitioner and George Moose basically agreed that in the Fall of 1978 the Petitioner and Moose first discussed the killing of the victim, that the Petitioner then agreed to pay Five Thousand Dollars ($5,000) for the murder; that the Petitioner gave Moose the money; that Moose gave the money to Bill Bryant to hire the assasin; and that after several months without luck in obtaining a hired assasin, the money was returned to the Petitioner. (Tr. p. 631, line 3-p. 649, line 10; p. 1266, line 21-p. 1241, line 15). The

Petitioner testified that after he got his money back in late February or early March 1979, he did not talk to Moose until after the victim had been murdered (Tr. p. 1241, line 19-p. 1242, line 13); although he admitted during cross-examination that in his initial statement to the police that one night while drunk he remembered a call, did not remember much about the call but did remember telling Moose to go ahead with the killing. (Tr. p. 1261, lines 8-18). He further testified that during this time he was drinking heavily, at least a quart of 160 proof vodka each day, which he stopped on Easter Sunday, 1979. (Tr. p. 1232, line 21-p. 1233, line 21; p. 1242, lines 13-17; p. 1244, lines 4-8). Moose testified that after the money had been given back to the Petitioner, he received a telephone call from another

conspirator as to whether the killing was still on; that he, Moose, then called Petitioner to find out and that the Petitioner gave them the go-ahead. (Tr. p. 651, line 16-p. 652, line 12; p. 654, line 18-p. 655, line 14). However, on this critical point Moose stated in his testimony for the first time that the Petitioner sounded drunk during the telephone call and that it was hard for him to understand the Petitioner. (Tr. p. 652, lines 13-23). Both men agreed that after the killing the Petitioner paid the Five Thousand Dollars ($5,000) for the killing. (Tr. p. 664, lines 10-15; p. 1245, line 23-p. 1246, line 20). In closing argument the Petitioner argued the defense of withdrawal and that as to the call whereby the Petitioner gave the go-ahead, either the Petitioner was so drunk that he did not

make a valid commitment which Moose should have known, or that in an effort to save himself Moose trumped up the alleged go-ahead statement which the Petitioner could neither admit or deny due to his drunken state at the time. (Tr. p. 1498, line 18-p. 1501, line 20; p. 1504, lines 9-14; p. 1553, lines 1-24).

Multiple representation of clients is not per se violative of the Sixth Amendment right to the effective assistance of counsel. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Even where such multiple representation involves a potential or actual conflict of interest, a defendant may waive such conflict if such waiver is made knowingly and intelligently. Holloway v. Arkansas, supra, 435 U.S. at 483, n. 5, 55 L.Ed.2d at 433, n. 5; Glasser v.

United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 86 L.Ed. 680, 699-700 (1942). The standard for measuring an effective waiver of such a constitutional right as the right to counsel, requires that the waiver must be an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Where the trial court is advised that a conflict does or may exist and the trial court holds a hearing in which the court informs the defendants of their right to independent counsel, explains basically the type of conflict which may arise and in which the defendants expressly waive any conflicts, the trial court has fulfilled its duty and the right to independent counsel is waived by the defendants. United States v. Laura, 667 F.2d 365 (3d Cir. 1981); United States

v. Cox, 580 F.2d 317 (8th Cir. 1978), cert. denied, 439 U.S. 1075, 99 S. Ct. 851, 59 L. Ed.2d 43; United States v. Waldman, 579 F.2d 649 (1st Cir. 1978); United States v. Lawriw, 568 F.2d 98 (8th Cir. 1977), 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60, reh. denied, 436 U.S. 951, 98 S.Ct. 2860, 56 L.Ed.2d 794; United States v. Villareal, 554 F.2d 235 (5th Cir. 1977), cert. denied, 434 U.S. 802, 98 S.Ct. 29, 54 L.Ed.2d 60; United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977), cert. denied, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383; United States v. Garcia, 517 F.2d 272 (5th Cir. 1975). In Garcia, a landmark case in this area, the Fifth Circuit Court of Appeals stated that where a trial court is advised of a potential conflict, the trial court should address each defendant personally and advise of

potential dangers of representation by counsel with a conflict. Further the defendants should be free to question the court on the nature and consequences of his representation. The Fifth Circuit held in Garcia that where a defendant after such a thorough consultation with the court knowingly, intelligently, and voluntarily waives his right to conflict-free counsel, the Constitution does not prevent the waiver. In Lawriw, the Eighth Circuit stated that where such a hearing is held a defendant's contention of lack of knowledge is incredible. As Justices Lumbard and Mansfield wrote in their concurring opinion in United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir. 1979):

> If we are to inquire into claims of prejudice in every case where codefendants have

> been convicted after trial during which two or more of them were represented by the same counsel despite full warning by the court of the dangers of such representation we are inviting the creation of strategies and situations during the course of trial which may lend color to claims of prejudice from conflicts of interests when the convictions are on appeal.

In this case as soon as the court was advised of a potential conflict, the court held an in camera hearing with each individual defendant, then the three defendants, and then the three defendants and their attorney. The court specifically discussed with the Petitioner the potential conflicts which could arise, especially the potential for conflict arising from the testimony of his coconspirators. The court asked the Petitioner if he had discussed the matter fully with his attorney, whether the defendant had any questions and if

the defendant still wished to proceed with Mr. Long. The Petitioner, a wealthy and very successful businessman who hired and paid Mr. Long to represent him and his brother-in-law, expressed his full understanding of the situation and not only his waiver of any conflicts but his express desire to proceed to trial with Mr. Long. Before his trial in Georgetown County, the court held another hearing and asked the Petitioner if he had changed his mind; he stated no change in his position. Clearly, the trial court fulfilled any obligation to the Petitioner and the Petitioner clearly waived any conflict.

The Respondent would respectfully submit that the South Carolina Supreme Court acted in complete accord with State and Federal law in upholding the Petitioner's conviction. This Petition

for a Writ of Certioari is therefore without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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